BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT HOWARD	)	
Claimant	)	
	)	
VS.	)	
	)	
BRADKEN	)	
Respondent	)	Docket No. 1,042,850
	)	
AND	)	
	)	
ILLINOIS NATIONAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 7, 2011, Award entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on July 6, 2011. The Director appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. John B. Rathmel, of Merriam, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant met his burden of proving that his ongoing headaches are related to his work-related accident of July 30, 2008. The ALJ further found that claimant was entitled to a work disability. Based upon a 100 percent wage loss and a 0 percent task loss, the ALJ determined that claimant had a 50 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award.[1] The Board also considered the independent medical report of Dr. Vito Carabetta dated July 21, 2010, and filed with the Division on July 23, 2010.

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[1] The ALJ listed the Regular Hearing with the wrong date. Also, although mentioned at page 6 of the ALJ's Award, during oral argument to the Board, the parties agreed the October 6, 2010, deposition of claimant was a discovery deposition and is not a part of the record.

ISSUES

Respondent does not dispute that claimant suffered a compensable accident but requests review of the ALJ's finding that claimant met his burden of proving he has headaches and that his claimed headaches are causally related to his injury of July 30, 2008. Respondent contends that claimant's testimony regarding the nature of his headaches is not credible. Respondent argues that because the burden of proof is on the claimant to establish his right to an award and because the provisions of the workers compensation act are to be applied impartially to both employers and employees, the Board should reverse or vacate the ALJ's Award.

Claimant argues the evidence shows he suffers from disabling headaches that are a result of his work-related accident of July 30, 2008, and, therefore, the ALJ's Award should be affirmed.[2]

The issue for the Board's review is: Did claimant prove that he suffered injuries resulting in disability and/or impairment that are causally related to his accident at work on July 30, 2008? Specifically, does claimant have post traumatic migraine headaches and if so, are those headaches work related?

FINDINGS OF FACT

Claimant started working for respondent on January 8, 2006, as an electronics tech repairman night shift supervisor. On July 30, 2008, claimant was hit in the face and knocked down by an arbor mill that had been stuck but suddenly popped out. The arbor mill weighed 65 to 75 pounds and hit claimant in the left upper front of his forehead. Claimant had on safety glasses, and they were broken into four pieces by the impact. When claimant was hit by the arbor mill, he was on the second rung of a ladder and was knocked about 10 feet backwards onto a set of concrete stairs, suffering pain and bruising in his left foot, back and left shoulder. Claimant could not say for sure whether he lost consciousness. He was taken to the emergency room by a coworker and had stitches in his face. He had follow-up treatment at OHS Compcare (OHS) the same day. He was seen again at OHS on August 5, 2008, and was released to return to work with his only restriction being that he not wear safety glasses. Claimant testified that at the time he was released from treatment, he was still having pain in his left foot, back and left shoulder and was having headaches. Claimant said he had headaches before the July 30, 2008, accident, but he had not had migraines before. When he had headaches before the

[2] During oral argument to the Board, claimant's counsel advised that despite Dr. Walker having given a task loss opinion, claimant was not raising the ALJ's failure to find a task loss as an issue on appeal because the ALJ's 50 percent work disability award based upon the 100 percent wage loss and 0 percent task loss put claimant's permanent partial disability award at the $100,000 maximum.

accident, he would control them with over-the-counter aspirin. He had not previously had a headache that required medical attention.

When claimant returned to work on August 5, he was given a full face shield to wear because of the restriction against safety glasses. Claimant was terminated the day he returned to work after he and his supervisor had a confrontation concerning claimant's non-use of the full face shield.

Respondent authorized treatment of claimant's injuries with Dr. Charles Donahoe. Claimant first saw Dr. Donahoe on April 23, 2009, at which time he complained of persistent headaches, double and blurred vision in his left eye, neck pain and left-sided weakness. Claimant saw Dr. Donahoe again on May 21, 2009, at which time Dr. Donahoe documented changes in claimant's attitude and personality, stating that claimant was short tempered and contentious. Claimant was then referred to Dr. Patrick Caffrey for a neuropsychological evaluation, as well as to an eye doctor to check out his left eye problem.[3] Respondent has not authorized any further treatment for claimant's headaches. Claimant testified that because he is a veteran, he has gone to the VA Hospital for some treatment. He said he was taking prescription Aleve for his headaches, and he gets those prescriptions from a doctor at the VA Hospital.

Claimant had a prior head injury in April 1994 when he fell off a ladder while at work. He fell onto concrete with the ladder landing on top of him. As a result of that injury, he was unconscious for five days and was off work for approximately 6 years. During that time, he was on Social Security disability. He said he did not have a problem with headaches after the April 1994 accident. He started attending college while he was off work in order to rehabilitate himself and return to the labor force. Claimant began working again in January 2002 and worked until his accident in July 2008.

Claimant said he was not having any physical problems performing his job at respondent before the accident in July 2008. He had not been working under any restrictions. He has not worked anywhere since he was terminated by respondent. He has not looked for work and does not believe he is capable of working. He has applied for Social Security disability.

Dr. Donahoe referred claimant to Dr. Patrick Caffrey, a psychologist in private practice, for a full neuropsychological evaluation. This was done over a two-day period from October 20 to October 21, 2009. Dr. Caffrey was provided with claimant's medical and psychological records, and he took a history from claimant. Claimant told Dr. Caffrey that he had a loss of consciousness for about 30 seconds after the accident. Dr. Caffrey

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[3] Although claimant made a claim for injuries to his left eye on his Application for Hearing, there was no other evidence in the file on his alleged injuries and no medical provider provided any testimony or medical report concerning his left eye.

acknowledged that records contemporaneous to the accident indicate claimant did not lose consciousness. However, Dr. Caffrey stated it is not unusual to have conflicting information from a patient about loss of consciousness.

Dr. Caffrey reviewed medical records from claimant's closed head injury suffered from his fall from a ladder in 1994. Claimant had neuropsychological testing done by Dr. Anthony Paola after the fall from the ladder. Dr. Caffrey, therefore, was able to compare claimant's current neuropsychological state with the previous neuropsychological baseline after the 1994 accident. Dr. Caffrey noted that Dr. Paola's testing set out deficits of mild intellectual deterioration, poor word list memorization, impaired selective attention, mild problems with language repetition, word finding pauses, borderline verbal and figural fluency, and left-sided motor and sensory signs. After Dr. Caffrey's testing in 2009, he stated that claimant's July 2008 injury did not aggravate, intensify or exacerbate his baseline deficits. The testing showed that claimant was at his baseline from 1994 at the time of Dr. Caffrey's testing, and any brain injury claimant had was from 1994 and not 2008.

Claimant complained to Dr. Caffrey of migraine headaches. Dr. Caffrey said that it is not possible to objectively determine whether someone is suffering from a headache. To the extent that providers want to provide help, they take for granted what the patient is reporting is true and accurate. Dr. Caffrey admitted his practice does not deal with the treatment of headaches or physical ailments. He did not evaluate claimant with regard to his claims of headaches, other than that he wanted a list of claimant's complaints.

Dr. Caffrey diagnosed claimant with postconcussional disorder superimposed on preexisting head trauma. The postconcussional disorder would relate to claimant's 2008 accident and his most important symptom would be his headaches. He also listed migraine headaches as a diagnosis, and he said that would be consistent with the postconcussion disorder. Dr. Caffrey did not notice that claimant was having difficulty with headaches during the period he was reading or concentrating on the tests.

Based on the AMA *Guides*,[4] Dr. Caffrey opined that claimant had a 10 percent impairment to the body as a whole for mild limitations impeding useful action in social and interpersonal daily functions. He believes that permanent impairment is associated with claimant's 1994 accident, not the 2008 accident.

Dr. Gregory Walker, a board certified neurosurgeon, evaluated claimant on January 27, 2010, at the request of claimant's attorney. Claimant gave him a history of being hit in the head with an arbor mill. He also gave a history of being unconscious for about 30 seconds. Dr. Walker reviewed claimant's medical records from his treatment from that

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

injury as well as medical records from claimant's previous injury when he fell off a ladder. Dr. Walker also performed a physical examination of claimant. He had no explanation for claimant's complaints of left-sided weakness. He only diagnosed claimant with posttraumatic migraines.

Regarding claimant's testimony that he could not remember if he lost consciousness after the accident, Dr. Walker indicated there would be no correlation between loss of consciousness and the development of disabling headaches. He said that posttraumatic headaches can develop from a head injury with or without loss of consciousness. Dr. Walker said there is no objective way to evaluate complaints of headache. Utilizing the AMA *Guides*, Dr. Walker rated claimant as having a 20 percent permanent partial impairment to the whole person as a result of the headaches.

Dr. Walker reviewed a task list prepared by Michael Dreiling.[5] Of the 19 tasks on the list, he opined that claimant was unable to perform 1 for a 5 percent task loss. However, Dr. Walker had a proviso at the end which stated: "Above is entirely dependent on patient being continuously followed and treated for headaches by Dr. Donahoe or a neurologist as they are very treatable."[6] Dr. Walker stated he would not allow claimant to do any of the job tasks until the headaches are treated. He opined that a person in claimant's state could not attend to tasks with 100 percent accuracy or focus and attend to safety. He further said the medication claimant is receiving from the VA Hospital is not the type that has any effect on migraines.

Dr. Vito Carabetta examined claimant on July 21, 2010, at the order of the ALJ. Claimant's chief complaint was left-sided frontal headaches. He described a burning pain just above the forehead. He had numbness on the left side of his face. He also reported to Dr. Carabetta that he had weakness down the whole left side of his body. Claimant described his accident as being struck in the facial area by an arbor mill, breaking his protective goggles. He reported losing consciousness for 15-20 minutes.

Dr. Carabetta noted some significant inconsistencies in his clinical examination of claimant, which he said made claimant's reporting of complaints questionable. He reviewed the diagnostic work up with the neuropsychological testing and said it showed no evidence of any brain dysfunction. The testing showed some improvement since claimant's severe injury in 1994. An MRI scan of the brain ordered by Dr. Donahoe and performed on April 15, 2009, demonstrated bifrontal chronic encephalomalacia changes consistent with claimant's 1994 injury.

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[5] Michael Dreiling, a vocational consultant, met with claimant on November 2, 2010, at the request of claimant's attorney. He compiled a list of 19 job tasks claimant had performed in the 15-year period before his work injury of July 30, 2008.

[6] Walker Depo. at 14.

Dr. Carabetta noted that claimant's subjective complaints of headache cannot be proved or disproved but must be taken on faith. He diagnosed claimant with post-traumatic cephalgia (headaches) and found that claimant was at maximum medical improvement. Using the AMA *Guides*, Dr. Carabetta found that claimant had a 15 percent whole person impairment based on his subjective complaints. He did not suggest the imposition of any restrictions.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[8] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[9]

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[7] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[9] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom*,[10] the Kansas Supreme Court, in overturning the requirement that a claimant must make a good-faith effort to find alternate employment after an injury, stated:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.

In *Tyler*,[11] the Kansas Court of Appeals stated: "Our Supreme Court's direction in *Bergstrom* could not be clearer. Absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court is not to read into the statute such a requirement."

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[10] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

[11] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

In *Osborn*,[12] the Court of Appeals reversed the Board's Order imputing a post-injury wage where it was determined the claimant failed to make a good-faith job search. Respondent argued the case was factually distinguishable from *Bergstrom* because the claimant in *Bergstrom* was directed to stop working by a physician whereas the claimant in *Osborn* voluntarily quit an accommodated job. Further, the respondent argued there must be a causal connection between the wage loss and the injury. The Court of Appeals rejected both arguments, noting there is nothing in K.S.A. 44-510e that permits the factfinder to impute a wage. Citing *Bergstrom* and *Tyler*, the Court of Appeals reiterated that there is no requirement for a claimant to prove a causal connection between the injury and the job loss.[13]

ANALYSIS

As a result of the 2008 accident, Dr. Caffrey diagnosed claimant with postconcussion disorder and migraine headaches. He said the headaches were consistent with the diagnosis of postconcussion disorder. Dr. Walker likewise diagnosed claimant with post-traumatic migraines, and Dr. Carabetta diagnosed claimant with post-traumatic headaches. The experts' medical opinion testimony is that there is no test or objective method for determining whether an individual is suffering from headaches. As such, whether claimant's complaints are legitimate depends upon claimant's credibility.

Here, the ALJ had the opportunity to personally observe the claimant testify. In finding claimant's headaches are related to his work-related accident of July 30, 2008, the ALJ apparently found him credible. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the claimant's credibility by personally observing him testify. As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*[14], appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[15]

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[12] *Osborn v. U.S.D. 450*, 2010 WL 4977119, Kansas Court of Appeals unpublished opinion filed November 12, 2010 (No. 102,674).

[13] See also *Serratos v. Cessna Aircraft Company*, Kansas Court of Appeals unpublished opinion filed July 1, 2011 (No. 104,101); *Guzman v. Dold Foods, LLC.*, 2010 WL 1253714, Kansas Court of Appeals unpublished opinion filed March 26, 2010 (No. 102,139).

[14] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

[15] *State v. Scaife,* 286 Kan. 614, 624, 186 P.3d 755 (2008).

Dr. Caffrey rated claimant's permanent impairment of function as 10 percent but did not relate it to the 2008 accident. Dr. Walker's rating was 20 percent, and Dr. Carabetta found claimant had a 15 percent whole person impairment based on the subjective complaints. The ALJ did not make a specific finding as to claimant's percentage of functional impairment, but he did find Dr. Carabetta, the court-ordered independent medical examiner, to be the most credible medical expert. The Board agrees and therefore adopts the Dr. Carabetta's 15 percent functional impairment rating. The Board further agrees with and adopts the ALJ's findings and conclusions concerning the nature and extent of claimant's disability.

CONCLUSION

Claimant has met his burden of proving that he is suffering from migraine headaches, post injury, and that those headaches are directly attributable to his work-related accident of July 30, 2008. As a result of his accidental injury, claimant has a 15 percent functional impairment and a 50 percent permanent partial (work) disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated March 7, 2011, is modified to find claimant's impairment of function is 15 percent but is otherwise affirmed.

Claimant is entitled to permanent partial disability compensation at the rate of $529 per week not to exceed $100,000 for a 50 percent work disability. As of July 14, 2011, there would be due and owing to the claimant 154.14 weeks of permanent partial disability compensation at the rate of $529 per week in the sum of $81,540.06 for a total due and owing of $81,540.06, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $18,459.94 shall be paid at the rate of $529 per week until fully paid or until further order from the Director.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Director for approval.

IT IS SO ORDERED.

Dated this _____ day of July, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge